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Supreme Court, U.S.
FILED
APR 17 2003
CLERK

No. 02-1399

In The

Supreme Court of the United States

D.A. and E.A.,

Petitioners,

v.

STATE OF UTAH, in the interest of W.A.,
a child under eighteen years of age,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Utah

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the decision of the Utah Supreme Court that the "status exception" to the minimum contacts requirement – an exception applied by this Court to domestic relations cases since at least 1877 – permits Utah to terminate the parental rights of nonresident natural parents to a Utah child who was left dependent in the state's custody by his legal guardian five years ago, despite their lack of minimum contacts with Utah.

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JURISDICTION

The judgments of the Utah Supreme Court in *State ex rel. W.A. v. D.A.*, 2002 UT 127, 63 P.3d 607, and *State ex rel. W.A. v. E.A.*, 2002 UT 126, 63 P.3d 100, were entered December 20, 2002. They are reprinted in Petitioners' Appendix at 1-29, 30-36. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1257 (1993).

STATEMENT OF THE CASE

Petitioners E.A. and D.A. are, respectively, the biological father and mother of W.A., a boy born in 1989 who has been in foster care in Utah for the last five years. They seek certiorari review of a decision of the Utah Supreme Court that affirmed juvenile court judgments terminating their parental rights to W.A. based on their abandonment of W.A. and on their unfitness. Pet. App. at 71-78.

The parents were charged by Oklahoma with felonies involving child sexual abuse in December 1993. In 1995, a Kentucky court order placed legal custody and guardianship of W.A. with his older sister, D.D., who shortly thereafter brought the child to Utah to reside with her.[1] In July 1996, E.A. was sentenced to twenty years of imprisonment for his conviction of lewd molestation of a child and to life imprisonment for his conviction of sexual abuse of a minor. D.A. was sentenced to up to ten years of imprisonment for

[1] There is no evidence in the record to support Petitioners' allegations, Pet. at 2, that the transfer of W.A.'s legal guardianship to his older sister was at their request or that D.D.'s action in moving W.A. to Utah was "unilateral."

her conviction of sexual abuse of a minor. Pet. App. at 2, 80.

In February 1998, D.D. contacted the Utah Division of Child and Family Services ("DCFS") and informed it she could no longer care for W.A., then nine years old. The State of Utah took the boy into protective custody and filed a petition alleging he was a "dependent" child, i.e., a minor who is homeless or without proper care. *See* Utah Code Ann. § 78-3a-103(1)(h) (Supp. 2001). The juvenile court adjudicated W.A. a dependent child and placed him in the custody and guardianship of the State of Utah in February 1998. Pet. App. at 2-3.

Nine months later, DCFS and W.A.'s guardian *ad litem* filed a petition to terminate Petitioners' parental rights to W.A. Petitioners, through appointed counsel, moved to dismiss the termination proceeding. They claimed it would violate Fourteenth Amendment due process to proceed against them because they lack "minimum contacts" with the State of Utah. The Utah juvenile court denied the motion, reasoning that a termination proceeding is a "status" determination excepted from the minimum contacts prong of due process analysis. Alternatively, the court ruled that Petitioners had the requisite minimum contacts with the State of Utah to satisfy due process. Pet. App. at 3, 10.

The court proceeded through trial on the merits of the termination petition, with different appointed counsel representing each parent. Meanwhile, both parents

remained incarcerated – E.A. in Oklahoma, D.A. in Texas.[2] The juvenile court found that Petitioners had abandoned W.A. and are unfit,[3] and it terminated their parental rights. *See* Pet. App. at 71-78. Petitioners' separate appeals raising the status exception issue were eventually resolved by the Utah Supreme Court in the companion decisions noted above.[4]

After initially determining that a Utah statute confers personal jurisdiction over the Petitioners,[5] the Utah Supreme Court went on to conclude that the juvenile court's exercise of such jurisdiction does not violate federal due process. The court reasoned that the status exception, which has long applied in state court proceedings to terminate a spouse/spouse relationship consistently with the Fourteenth Amendment notwithstanding one spouse's lack of any minimum contacts with the forum state – is equally applicable in state court proceedings to terminate the parent/child relationship. Pet. App. at 10-18. Moreover, Petitioners' recognized interest in maintaining their parental rights was more than adequately safeguarded by the numerous procedural protections given them by Utah law, such as notice, appointed counsel, and full ability to present evidence, summon witnesses, and pursue an

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[2] There is no evidence in the record to support Petitioners' allegation, Pet. at 3, that D.A. was released from prison prior to entry of the juvenile court's termination order.

[3] *See* Utah Code Ann. §§ 78-3a-407(1), -407(3) (Supp. 2001); *id.* § 78-3a-408(1)(c), (2)(e), (4)(a) (Supp. 2001) (reordered in 2002).

[4] The Utah Supreme Court did not reach the issue of the alternative ruling regarding the presence of minimum contacts between Petitioners and the State of Utah. Pet. App. at 10 n.5.

[5] *See* Utah Code Ann. § 78-3a-110(13) (2002).

appeal. *See id.* at 18-19, ¶ 30. The court also pointed out the competing interest the State of Utah has in determining the legal status and future of a Utah child, particularly one it has been "financially, emotionally, and physically supporting" since February 1998. *Id.* at 18, ¶ 29. Perhaps most importantly, the court noted, if Utah courts lack jurisdiction to consider a petition to terminate Petitioners' parental rights to W.A., no other state would be able to assert both personal jurisdiction and subject matter jurisdiction to resolve W.A.'s status. *Id.*[6]

The Petition for Writ of Certiorari ensued, with E.A. and D.A. asking this Court to review the ruling of the Utah Supreme Court on the applicability of the status exception to parental rights termination proceedings. In the meantime, W.A. remains in foster care in the custody and legal guardianship of the State of Utah, still awaiting permanency and final resolution of his status vis-a-vis the biological parents who have not been his legal or physical custodians since 1995, when he was six years old. W.A. turned fourteen two months ago.

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[6] This is because statutes based on uniform laws have been enacted nationwide to govern interstate child custody disputes, including terminations of parental rights, that involve increasingly mobile and dispersed parents. These statutes grant subject matter jurisdiction over such proceedings to their state courts based on the *child's* connections to the forum state, not on the parent's. *See, e.g.*, Utah Code Ann. §§ 78-45c-201 to -204 (2002); 43 Okl. Stat. Ann. §§ 551-201 to -203 (2001); Vernon's Tex. Stat. Ann. §§ 152.201-203 (2001).

REASONS FOR DENYING THE PETITION

I. THERE IS NO SIGNIFICANT CONFLICT AT THE STATE LEVEL, AS THE DECISION BELOW COMPORTS WITH THE NEARLY UNANIMOUS VIEW OF STATE COURTS THAT HAVE ADDRESSED THE APPLICABILITY OF THE STATUS EXCEPTION TO TERMINATION PROCEEDINGS

Petitioners erroneously suggest that the sole source for the status exception applied by the Utah Supreme Court is a renegade footnote in *Shaffer v. Heitner*, 433 U.S. 186, 208 n.30 (1977). *See* Pet. at 5-6. But, as the Utah Supreme Court noted, this Court recognized this exception to the minimum contacts requirement 125 years ago in the seminal personal jurisdiction case:

> To prevent any misapplication of the views expressed in this opinion [regarding the Fourteenth Amendment], it is proper to observe that *we do not mean to assert, by any thing we have said, that a state may not authorize proceedings to determine the status of one of its citizens towards a non-resident*, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil *status* and capacities of its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on [in] its territory.

Pet. App. at 11 (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877), and adding emphasis and bracketed material). *Shaffer* merely reaffirmed that cases involving the status

of a plaintiff are unique and can be pursued in the plaintiff's home state even if that judicial forum does not have personal jurisdiction over the defendant. Pet. App. at 11.

As this Court explained in *Shaffer*, "*Pennoyer* itself recognized . . . that cases involving the personal status of the plaintiff, such as divorce actions, could be adjudicated in the plaintiff's home State" despite the defendant's absence from the state. 433 U.S. at 201; *accord Estin v. Estin*, 334 U.S. 541, 544 (1948); *Williams v. North Carolina*, 317 U.S. 287, 298-99 (1942); *Maynard v. Hill*, 125 U.S. 190, 209 (1888). Although an assertion of personal jurisdiction must usually comply with the "minimum contacts" standard set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), nothing in the Fourteenth Amendment "suggest[s] that jurisdictional doctrines . . . , such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness." *Shaffer*, 433 U.S. at 208 n.30 (quoted in Pet. App. at 11) (citing Roger J. Traynor, *Is This Conflict Really Necessary*? 37 Tex. L. Rev. 657, 660-61 (1959)).

Petitioners also create the false impression that few state courts have addressed the issue of whether the longstanding status exception applies in proceedings to terminate parental rights, obviating the need for minimum contacts between a parent and the forum state. Numerous courts have done so over the last quarter-century and almost all, including the Utah Supreme Court, have held that it does. *E.g.*, *S.B. v. State Dep't of Health & Soc. Servs.*, 61 P.3d 6, 14-15 (Alaska 2002); *In re Appeal in Maricopa County*, 543 P.2d 454, 459 (Ariz. Ct. App. 1975); *In re M.L.K.*, 768 P.2d 316, 319 (Kan. App. 1984); *In re Adoption of Copeland*, 43 S.W.3d 483, 486-87 (Tenn. Ct. Apps. 2000), *appeal denied* April 16, 2001; *White*

v. Blake, 859 S.W.2d 551, 563 (Tex. App. 1993); *In re M.S.B.*, 611 S.W.2d 704, 706 (Tex. App. 1980); *A.E.H. v. C.C.*, 468 N.W. 2d 190, 198-99 (Wis.) (referring to the status exception and concluding personal jurisdiction over a nonresident parent was not required in a termination proceeding under local version of the Uniform Child Custody Jurisdiction Act), *cert. denied*, 502 U.S. 925 (1991); *cf. Wenz v. Schwartze*, 598 P.2d 1086, 1092 (Mont. 1979) (concluding, without discussing status exception, that personal jurisdiction over parent is not required to terminate parental rights), *cert. denied*, 444 U.S. 1071 (1980).[7]

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[7] Moreover, the overwhelming majority of state courts addressing the issue have held, more generally, that due process permits adjudication of the custody of a child residing in the forum state under local versions of the Uniform Child Custody Jurisdiction Act, without a showing of a nonresident parent's minimum contacts with the forum state. *See In re Marriage of Leonard*, 175 Cal. Rptr. 3d 903, 906-13 (Cal. App. 1981) (relying expressly on the status exception); *People ex rel. Wyoming v. Stout*, 969 P.2d 819, 821 (Colo. App. 1998); *Balestrieri v. Maliska*, 622 So.2d 561, 563 & n.1 (Fla. App. 1993); *Thompson v. Thompson*, 526 S.E.2d 576 (Ga. App. 1999); *In re Marriage of Mobley*, 569 N.E.2d 323 (Ill. App. 1991); *In re Marriage of Hudson*, 434 N.E.2d 107, 117-18 (Ind. App. 1982), *cert. denied*, 459 U.S. 1202 (1983) (relying expressly on status exception); *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001); *Martinez v. Reed*, 490 So. 2d 303, 306 n.1 (La. App. 1986); *Glanzner v. State Dep't of Social Servs.*, 835 S.W.2d 386 (Mo. App. 1992); *Genoe v. Genoe*, 500 A.2d 3 (N.J. App. 1985); *Harris v. Harris*, 410 S.E.2d 527 (N.C. App. 1991); *Joliff v. Joliff*, 829 P.2d 34, 36 n.5 (Okl. 1992); *In re C.O.*, 856 P.2d 290, 293 n.2 (Okl. App. 1993); *Pratt v. Pratt*, 431 A.2d 405, 409 (R.I. 1981); *Roderick v. Roderick*, 776 S.W.2d 533, 535-36 (Tenn. Ct. App. 1989); *In re S.A.V.*, 837 S.W.2d 80, 84 (Tex. 1992); *Hudson v. Hudson*, 670 P.2d 287, 293 (Wash. App. 1983) (relying expressly on status exception); *McAtee v. McAtee*, 323 S.E.2d 611 (W. Va. 1984); *Davidson v. Davidson*, 485 N.W.2d 450, 453 (Wisc. App. 1992). *See generally* Anthony Dorland, *Civil Procedure – Orders for Child*

(Continued on following page)

Petitioners point to only one state court of last resort that has held to the contrary. The Hawaii Supreme Court required a showing of minimum contacts between the state and a noncitizen mother who resided in the Philippines before her parental rights to her dependent son in state custody could be terminated. *In re John Doe*, 926 P.2d 1290, 1299 (Haw. 1996). An intermediate state appellate court reached the same conclusion in *In re Vernon R.V.*, 991 P.2d 986 (N.M. App. 1999), which also involved a parent residing in the Philippines. These cases are readily distinguishable as involving the unique considerations of fairness to noncitizen parents unable to come to this country to defend their parental rights even if willing to do so.

In addition to being consistent with the rulings of almost every state court that has faced the same issue, the Utah Supreme Court's decision validates the actual practice in terminations and child custody proceedings in Utah and nationwide for at least the last thirty years. Every state adopted some version of the 1968 Uniform Child Custody Jurisdiction Act ("UCCJA"), 9 U.L.A. Part 1A, 270-647 (1999); *id.* at 261-62. This act, which applies to all "child custody proceedings," was promulgated to ensure interstate enforcement of child custody decrees, while at the same time discouraging their relitigation by peripatetic parents and deterring parental kidnapping. *Id.*, UCCJA Prefatory Note, at 262-63; UCCJA § 1, 9 U.L.A. Part 1A, 271 (1999). Many states, including Utah,

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have updated their statutes by adopting some of the supplementary provisions of the 1997 Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), 9 U.L.A. Part 1A, 657-706 (1999 & Supp. 2002), which expressly defines the term "child custody proceeding" to include actions to terminate parental rights. *Id.* § 102(4), 9 U.L.A. Part 1A, 657; *see* Utah Code Ann. § 78-45c-102(4) (Supp. 2002) (effective July 1, 2000).

Although both uniform acts require notice to a nonresident parent and contain provisions ensuring the nonresident parent can meaningfully participate in the termination proceeding in the forum state, neither act requires personal jurisdiction over a nonresident parent before the forum state court can exercise its subject matter jurisdiction in a child custody proceeding. *See* UCCJA §§ 3-5, 18-22, 9 U.L.A. Part 1A, 307-466, 628-38 (1999); UCCJEA §§ 108-112, 201, 205, 9 U.L.A. Part 1A, 664-69, 671, 679 (1999); *see also* note 6, *supra*. "Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination." UCCJEA § 201(c), 9 U.L.A. Part 1A, 671 (1999).

According to the drafters of the 1968 uniform act, "There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions . . . are proceedings *in rem* or proceedings affecting status." UCCJA § 12 comment, 9 U.L.A. Part 1A, 557 (1999); *accord* UCCJA § 13 comment, 9 U.L.A. Part 1A, 559 (1999); Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 Vand. L. Rev. 1207, 1233 (1969) (hereafter Bodenheimer).

Thus, for several decades state judges across the country have adjudicated many thousands of child custody and child welfare cases, including terminations, in reliance on statutes that assume personal jurisdiction over nonresident parents is unnecessary as long as the child's contacts with the forum state are sufficient to give them subject matter jurisdiction under state law. In light of the long line of state cases, noted above, giving constitutional sanction to that accepted practice, culminating most recently in the decisions of the Utah Supreme Court and the Alaska Supreme Court, it is apparent that there is no substantial conflict among the states needing this Court's resolution on certiorari review.

II. APPLICATION OF THE LONGSTANDING STATUS EXCEPTION TO TERMINATION PROCEEDINGS DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

As shown above, the decision of the Utah Supreme Court flows naturally from this Court's decision in *Shaffer* and prior decisions recognizing and applying the status exception. In addition, however, Petitioners contend that the decision in the instant case conflicts with *May v. Anderson*, 345 U.S. 528 (1953). Relying only on selected sentences from the plurality opinion in *May*, Petitioners mischaracterize it as holding that a custody decree entered without personal jurisdiction over a parent violates due process. *See* Pet. at 10.

In *May*, the opening paragraph of the plurality opinion states the narrow question before the Court as whether an Ohio court was required by the Full Faith and Credit Clause to enforce an *ex parte* Wisconsin decree awarding custody to the Wisconsin parent. *May*, 345 U.S.

at 528. Although the question was restated somewhat differently elsewhere in the plurality opinion, *e.g.*, *id.* at 533, Justice Frankfurter provided the fifth vote needed for reversal. In his concurrence, which necessarily limited the holding of the case, he laid out what he understood the Court to be deciding (or not deciding) as follows:

> What is decided – the only thing the Court decides – is that the Full Faith and Credit Clause does not require Ohio, in disposing of the custody of the children in Ohio, to accept, in the circumstances before us, the disposition made by Wisconsin.

Id. at 535 (Frankfurter, J., concurring). Thus, Ohio could enforce the Wisconsin decree as a matter of comity or local law, but was not compelled by the Constitution to do so. *Id.* at 535-36.

As the Utah Supreme Court pointed out, the plurality's language selectively relied upon by Petitioners is mere dicta. Pet. App. at 17. Moreover, *May* has consistently been interpreted as a Full Faith and Credit Clause decision, in accordance with Justice Frankfurter's concurrence. *See id.* at 15-17 (and cases cited therein). Indeed, the 1968 Uniform Child Custody Jurisdiction Act is based on such an interpretation of *May*. Bodenheimer, *supra* at 1232; UCCJA § 12 comment, 9 U.L.A. Part 1A, 557 (1999) (characterizing *May* as relating "to interstate recognition rather than in-state validity of custody decrees"); UCCJA § 13 comment, 9 U.L.A. Part 1A, 559 (1999) (noting that, though the act does not require personal jurisdiction over a nonresident parent in a custody determination, this is "in accord with a common interpretation of the inconclusive decision in *May v. Anderson*. . . . "). According to the UCCJA drafter and other family law experts, a reading of

May as holding that personal jurisdiction over absent parents is constitutionally required for a binding custody decree, precisely the reading espoused here by Petitioners, "would be a catastrophe." Brigitte M. Bodenheimer & Janet Neeley-Kvarme, *Jurisdiction and Child Custody and Adoption after Shaffer and Kulko*, 12 U. Cal. D.L. Rev. 229, 243 (1979) (quoting H. Clark, *The Law of Domestic Relations* 610 (1968)).

Finally, the decision of the Utah Supreme Court does not conflict with that in *Kulko v. Superior Court*, 436 U.S. 84 (1978). *See* Pet. at 10. In *Kulko*, this Court refused to sustain the California court's application of the *International Shoe* "minimum contacts" standard to the facts in the case and held that the California court could not, consistent with due process, adjudicate the child support obligation of the appellant New York father who lacked such contacts. *Kulko*, 436 U.S. at 92-96.[8] The *Kulko* appellant did not challenge the California court's assertion of personal jurisdiction over him to make a custody determination, despite his lack of minimum contacts with California. 436 U.S. at 88.

Contrary to Petitioners' misrepresentation, this Court did not expressly hold in *Kulko* "that the 'status' exception does not apply to the financial aspects of a marital dissolution. . . . " Pet. at 10 (citing to *Kulko*, 436 U.S. at 100-01). In fact, the status exception is never even mentioned in

[8] "It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has personal jurisdiction over the person of the defendant." *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957); *accord Krieger v. Krieger*, 334 U.S. 555, 557 (1948).

Kulko, which is understandable: unlike terminations and other child custody determinations, the setting of child support does not involve a determination of the status of the child in the forum state.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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April 2003